Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Kevin John Cain,

Petitioner,

v.

Anne Marie Cole, Cain

Respondent.

On Petition For A Writ of Certiorari To The Second Circuit Court Of Appeals of Louisiana

PETITION FOR A WRIT OF CERTIORARI

KEVIN JOHN CAIN
In Proper Person
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QUESTIONS PRESENTED

State exceeded its constitutional and statutory authority granted under the Fourteenth Article of the Amendments to the Federal Constitution and violated petitioner's:

1. substantive due process rights when it modified a 1997 award of joint custody pursuant to a court order on October 5, 2004.
2. substantive due process rights in a civil litigation in which due process required a burden of proof of preponderating evidence regarding parental fitness.
3. substantive and procedural due process rights when it suspended the fathers visitation rights and duties despite petitioners full compliance with the order.

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JURISDICTION

This appeal comes to the US Supreme Court on appeal by right of challenge that the Louisiana State Court upheld the validity of La CC Statute Article 131 and Article 132 pursuant to its Judgment rendered May 11, 2005 and in violation of due process of law as guaranteed by Article Fourteen of the US Constitution. This request for application for Writ of Certiorari to the US Supreme Court is sought after denial of a Writ of Certiorari to the Louisiana Supreme Court on June 15, 2005 and after exhausting all state remedies available and is sought requesting relief from irreparable damage to petitioner's procedural and substantive due process rights from an executory state judgment exceeding the powers conferred to the state by Article 14 of the US Constitution. The federal questions were raised and documented both in the appellate brief(s) and in oral arguments thereof before the La. Second Circuit Court of Appeal of Louisiana in April 2005. Jurisdiction over this writ is vested in Title 28 U.S.C. Part IV Chapter 81 sections 1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 of the U.S. Code

US Constitution AMENDMENT XIV Passed by Congress June 13, 1866. Ratified July 9, 1868.Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In general, State exceeded its constitutional and statutory authority granted under the fourteenth article of the Amendments to the federal Constitution and violated petitioner's substantive due process rights when it modified a 1997 award of joint custody pursuant to a court order on 10/5/2004. *Tumey v. State of Ohio* 273 U.S. 510, 47 S.Ct. 437 U.S., 1927. Mar 07, 1927. The fourteenth article of the Amendments to the Federal Constitution denies the state the right to deprive one of life, liberty, or property, without due process. Due process for the case at issue requires a burden of proof in child custody cases, that pursuant to La CC Art 131... is the best interest of the child. La CC Art 131 and La. C.C. Art. 132 provides in pertinent part: "In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to parents jointly." La. C.C. art. 132 provides in pertinent part: "... if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent." The record shows plaintiff and petitioner executed a 1997 decree of divorce waiving implementation of a joint custody implementation plan. Plaintiff submitted a Joint Custody Implementation Plan to the trial court in January 2003 evidencing a continuing accord with the 1997 agreement. In accordance with Louisiana statutory and case law *Evans v. Lungrin* 708 So.2d 731La.,1997-0541 (La 2/6/98) no longer is joint custody simply presumed to be in

the best interest of the child; it is mandated absent an appropriate parental agreement for another custodial arrangement. The revisions also contain changes in the burden of proof in custody determinations. Pursuant to the revised La. C.C. art. 132, a substantially higher burden is now placed on the parent seeking sole custody--that of "clear and convincing evidence."

In general, state exceeded its constitutional and statutory authority granted under the fourteenth article of the Amendments to the Federal Constitution and violated petitioner's due process rights when it suspended the fathers visitation rights and duties despite petitioners full compliance with the order. Further trial court violated procedural substantive due process rights of petitioner when it appointed a post trial evaluator, Patrick Sewell, M.D., in the final Judgment dated October 5, 2004 after it received notice of Patrick Sewell MD's refusal to consent to act in a pre Judgment hearing conducted on October 1, 2004.

The trial court modified the 1997 joint custody arrangement that had been in existence for the past 7 years and granting ex-wife sole custody of the children because the record failed to support and prove a material change in circumstances affecting the welfare and best interest of the children since the entry of the original custody decree in accordance with La C.C. Article 131, La C.C. Article 132 and La C.C. Article 134. (Exhibit I-V Volume I of III, page 88 Amended Interim Order; Exhibit I-V Volume I of III pages 223-228 October 5,2004 Judgment; Exhibit I –V Volume I of III page 14, 1997 Judgment of Joint Legal Custody). (Clerk's Transcripts, Vol..3, page 636, lines 13-21) The Court stated in the reasons for judgment, "The bottom line in this case are should there be sole custody or leave it as joint custody. One thing that has not been what shall I say has not been contested in this lawsuit is that Mr. Cain and Ms May don't communicate and don't talk. I'm going to award sole custody to Ms. May. I think it would be ridiculous to have joint custody. I think she'll make the day to day decisions in the boys lives." The record

demonstrates plaintiff intent and ability to communicate as evidenced by plaintiff's filing of a Rule to Implement Joint Custody Implementation Plan in January 2003 and that a reasonable factual basis does not exist for the trial court finding to modify the 1997 decree. The record failed to support a finding that the parents do not communicate. The record clearly shows both parents have exhibited agreement on the major issues of raising the children such as education, religious training, and medical treatment, *Bagents v. Bagents*, 419 So.2d 460 (La.1982), *Mart v Hill* 505 so2d 1120 (la 1987). Father testified, "when the boys –we have responsibilities. We have two children. We have to talk about health, food, cafeteria, I mean, just any and everything that you have in the normal rearing of children. I don't have any problem with communicating with the responsibilities of rearing a child." (Clerks Transcripts, Vol.. III, page 560, lines 23-30)..."We'd minimize it, but I don't know that we'd have any problem, no. (Clerk's Transcripts, Vol..III, page 561, lines 2,3).....but I would talk with Jeff, Charlene and Anne Marie as needed." (Clerk's Transcripts, Vol..3, page 561, line 29,30). *Bourque v Bourque*, 870 So.2d 1088, 03 -1254, (La. App. 5 Cir. 3/30/04); *Ketchum v Ketchum*, 882 So.2d 631, 39,082, (La.App.2 Cir 9/1/04); *Haik v Haik*, 648 So.2d 1015, 94-563 (La..App. 5 Cir.12/14/94).

Attorney Kammer to the court page 560 line 31 – 32 "but in the past have y'all been able to communicate with each other from 1999 forward up until the time this lawsuit was filed?

Petitioner to the Court Page 561 line 7 – 8 "we'd minimize it, but I don't know that we have any problem, no"

The Court Page 561 line 5 – 6 "You don't think y'all have a problem?"

Petitioner to the Court Page 561 line 7 – 8 "Well I think we do, your honor, I mean, we just minimize; Page 561 line 29 - 30 "I would talk with Jeff, Charlene and Anne Marie as needed; Page 561 lines 14 and 15 What communication do we have? We talk about the boys.

The appeal court overlooked the fact that there was not a reasonable basis for the trial court finding of a "lack of communication" and that the record did not support such a finding. The trial court judge abused his discretion in changing the 7 year joint to sole custody on but one factor included in the realm of factors in La. CC Art 134. There are numerous factors which the trial court must consider in making its determination. The father argues the trial courts reason for modifying the 1997 Joint Custody order due to its findings as stated "ya'll don't communicate" was insufficient because it is but one factor stated in La CC Art 134 and thus insufficient to modify the 1997 joint custody decree and as such is a clear abuse of discretion. Trial judges are not permitted to overlook the factors legislatively enacted to guide their deliberations or point to one factor over all others which may favor a contrary custody placement. *Bynog v Bynog*, 95-173 (La App. 3d Cir 7/26/95), 663 So.2d86.

Mother's allegation that the father is unfit is not supported by the record. Plaintiff never raised this as issue when we divorced in 1997 and agreed to joint custody. Father strongly denies any animosity or ill will between himself and Mother or her parents. The record shows the court heard 5 of 10 witnesses tendered by father that the father is a good father and that the father has not exhibited any ill will towards the mother. The father argues in awarding or modifying a custody arrangement, the best interest of the children is not only the paramount consideration, but is, in effect, the sole criterion. *Favaloro v Cooper*, 562 So2d 943, La.App.5 Cir., 1990. The best interest of the child remains the paramount concern in making custody determinations, and must be balanced with a parent's right to equally share the physical custody of the child where feasible. *Shambley v Holmes*, 821 So.2d 21, 02-116 (La. App. 5 Cir. 5/15/02); *DeGeorge v Gilley*, 701 So.2d 1079, No. 97-CA-387 (La. App. 5 Cir.10/28/97). Father argues that the trial court has a duty to consider the factors contained in the Louisiana Civil Code. La. C.C. Art. 134. La. C.C. Art. 134 states that the list of factors

in that article is a guide for the trial court, and there is no authority for reversing a trial court's failure to consider all the listed factors. In this case the trial court pointed to one sole factor (i.e. "ya'll don't communicate") of finding and the resulting modification constitutes abuse of discretion. Father points out that even the court appointed evaluators stated in their report, "Both Ms. Anne-Marie Cole and Mr. Kevin John Cain are interested in actively parenting the children. Both parents provide each child with emotional nurturance, values, educational performance, and extracurricular activities." (Exhibit P-1, pg. 5) Mother offered no proof of her allegations of harassment by the Father or that the Father was unfit or a harm to the children. Father strongly denies any animosity or ill will between him and the Mother or the Mothers' parents. The court heard testimony from 5 of 10 witnesses tendered by Father that he is a good Father and that he has not exhibited any ill will towards the Mother. (Clerk's Transcripts, Vol.. III, page 542-580, lines 1-32 each page, Vol.. III, pages 596-601, lines 1-32 each page) The record shows both parents have exhibited agreement on the major issues of raising the children such as education, religious training, and medical treatment. Such an award of sole custody to the Mother is inconsistent with the findings and is not in the best interest of the children in accordance with La.CC Art 131; La.CC Art 132; La.CC Art 134. The record showed that on Father's return from military duty, he was active in the daily lives of raising the children (actively coaching the children in organized sports, attending church services, following school progress, etc.). There was no support in the record that the time spent by the children with Father at ball games and other visitation was not in their best interest. The correct standard to be applied by the trial court is the best interest of the children. *Bynog v Bynog*, 95-173 (La App. 3d Cir 7/26/95), 663 So.2d86. *Matherne v Matherne,* 562 So.2d 937, No.90-CA-2, (La.App.5 Cir.1990). LA. R.S 9:335 provides that a written implementation order should set forth the sharing arrangement for physical custody and designate the domiciliary parent. To